Supreme Court, U.S.
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No. 96-1984

In The

Supreme Court of the United States

October Term, 1996

THE CROW TRIBE OF INDIANS,

Cross-Petitioner,

v.

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; MARTHA FLETCHER; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

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ARGUMENT

The Briefs for the United States and for the Non-federal Cross-Respondents (Montana) in opposition to the Crow Tribe's Conditional Cross-Petition demonstrate why the issue raised in the Cross-Petition should be reviewed if, contrary to the Crow Tribe's principal position, this Court grants the Petition filed by Montana and Big Horn County (# 96-1829).

1. Contrary to the primary argument advanced by both the United States (Opp'n Br. at 22-23) and Montana (Opp'n Br. at 10-12), the District Court's factual findings do not justify denying the Conditional Cross-Petition. First, the District Court recognized that Montana's illegal taxes "impair[ed] the tribe's ability to negotiate leases with Shell Oil and other coal companies" and found that "[t]he existence of the Montana taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe." Pet. App. 38, 41; Cross-Pet. at 7, 9. Those unchallenged findings establish that Montana's illegal taxes harmed or injured the Tribe in its business dealings with Shell. Standing alone, they are a sufficient predicate for the Tribe's contention that the courts below erred as a matter of law in denying *any* relief to remedy that wrong. *See* Cross-Pet. at 15, 19-20 & n.9.

Second, the question presented in the Cross-Petition is whether the very findings on which the cross-respondents rely were contaminated by the burden of proof being placed improperly on the Tribe rather than on the wrongdoers, Montana and Big Horn County. "It is elementary" that "where findings are infirm because of an erroneous view of the law, a remand is the proper course

unless the record permits only one resolution of the factual issues." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

"[T]he assignment of the burden of proof is a rule of substantive law." *OWCP Director v. Greenwich Collieries*, 512 U.S. ___, ___ 129 L.Ed.2d 221, 227 (1994). Determining whether the lower courts applied an erroneous burden of proof is a worthy subject for review by this Court. In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 663 (1979), for example, certiorari was granted to consider whether the lower courts properly construed a federal statute, 25 U.S.C. §194, which imposed the burden of proof upon the "white person" in all trials with an Indian about the right of property. This Court's interpretation of the statute differed in part from the lower courts', so the case was remanded for new findings based on the correct legal standard. The burden of proof issue presented in the Tribe's Cross-Petition is at least as worthy of this Court's attention because it is likely to arise across a broader spectrum of cases, whenever federal courts are requested to fashion appropriate remedies to redress violations of federal law.

2. The United States acknowledges that the Court of Appeals erred by limiting the rule of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," to proof of the amount of damages as opposed to establishing the fact of injury or causation. Opp'n Br. at 23, 24 & n.13. The government also concedes that this Court, as well as five courts of appeals, have applied the *Bigelow* rule to issues of causation. *Ibid.* The questions raised by the United States regarding the force

and scope of the *Bigelow* rule (Opp'n Br. at 23-24) are the very sort of issues that should be addressed if this Court grants the petition to review the rules governing the fashioning of appropriate equitable remedies to redress violations of federal law.*

As this Court stated in *Chrysler Motors*, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." 451 U.S. at 567. The government offers neither reason nor authority nor any equitable consideration supporting the imposition of the burden of proof regarding factual uncertainties attributable to the wrongdoers' illegal conduct on those whose federally protected rights were violated.

3. Montana similarly seeks to distinguish *Bigelow* and the analysis of the causation issue in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381-86 (1970), on the grounds

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* Even if, as the government suggests, the *Bigelow* rule only "lightens" plaintiff's burden of proof, as opposed to shifting it to the defendants, the issue of causation should be remanded to the district court for a factual determination based on that relaxed standard.

With regard to the proper scope of the *Bigelow* rule, this Court has explained that the *Bigelow* rule applies in the business context where "the vagaries of the marketplace usually deny us sure knowledge of what the plaintiff's situation would have been in the absence of defendant's violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). The question of whether the Tribe and Shell would have been able to restructure their relationship if Shell had been able to offer the Tribe an additional $480 million over the 20 year lease period (*see* Cross-Pet. at 6-7) is as subject to the vagaries of the marketplace as any other business transaction.

that those decisions should be limited to the antitrust and securities areas. Opp'n Br. at 12-16. In so doing, Montana ignores this Court's decision in *Chrysler Motors* which explains that the *Bigelow* rule is predicated "in part on the difficulty of ascertaining business damages" and also "on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof." 451 U.S. at 566, 568. These factors are equally applicable to the circumstances of the instant case involving Montana's impairment of the business relationship between the Tribe and Shell through the enactment and imposition of its illegal coal taxes. Montana also ignores lower court decisions such as *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396, 401 (8th Cir. 1991), which cite and follow *Bigelow* for the broad rule that "equity . . . resolves uncertainties against those whose wrongful acts or omissions created them." These decisions are consistent with the underlying principle that "[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done." *Bigelow*, 327 U.S. at 265. While Montana, unlike the United States, does not concede that the Ninth Circuit erred by restricting the *Bigelow* rule only to proof of the amount of damages, it does not cite any decisions or other authorities either supporting the distinction made by the Ninth Circuit or justifying the imposition of rules and standards which make it more difficult to award relief to redress the invasion of federal rights.

4. Montana also argues that assertion of the Tribe's Shell contractual impairment claim against the State is now precluded by the Eleventh Amendment owing to the government's decision not to seek review of the lower

courts' judgment. Opp'n Br. at 17. This precise issue has not been decided by this Court. In *Arizona v. California*, 460 U.S. 605 (1983), however, this Court held that when the United States brings a claim against a state on behalf of an Indian tribe "the States involved no longer may assert that [Eleventh Amendment] immunity *with respect to the subject matter of this action.*" 460 U.S. at 614, emphasis added. Because the States' Eleventh Amendment immunity could not be asserted with respect to the subject matter of that action, the Indian tribes were allowed to press claims to water rights beyond those made by the United States on its behalf. Thus, *Arizona v. California* strongly suggests that the Eleventh Amendment does not apply to the Crow Tribe's Shell contractual impairment claim which was included in the subject matter of the action brought by the United States against Montana.

In any event, the Eleventh Amendment issue may be considered if the Petition and Conditional Cross-Petition are granted. The mere existence of the issue does not warrant denying the Cross-Petition.

CONCLUSION

The Conditional Cross-Petition should be granted if the Petition is granted.

Respectfully submitted,

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